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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1958

No. 421

MICHAEL MALMENATO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Illinois.

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PEOPLE OF THE STATE OF ILLINOIS,

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Petition For Writ Of Certiorari To The Supreme Court Of The State Of Illinois.

Michael Malmenato, petitioner, prays that a Writ of Certiorari issue from this Court to review a judgment of the Supreme Court of the State of Illinois entered on May 21, 1958. Petition for rehearing was denied on June 18, 1958, and the judgment of the Supreme Court of Illinois became final. On the 25th day of July, 1958, the Chief Justice of the Supreme Court of Illinois entered an order staying the mandate until disposal of the petition for Writ of Certiorari from the Supreme Court of the United States.

CITATION TO OPINION BELOW.

The judgment of the Supreme Court of Illinois, subject of this Petition for Writ of Certiorari (R. 11-20) is reported in 14 Ill. 2d 52, 150 N.E. 2d 806. The opinion is included here as Appendix A.

JURISDICTION.

The judgment of the Supreme Court of Illinois became final on denial of rehearing on June 18, 1958. (R. 23). On September 16, 1958, Mr. Justice Clark extended the time for filing the Petition for Writ of Certiorari to and including October 6, 1958. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257 (3).

QUESTIONS PRESENTED.

1. Whether petitioner was denied due process of law in the state court criminal trial when, at the end of the first day of the trial, a member of the jury selected to hear his case read an article published in a local newspaper in which the petitioner was characterized and described as one who had "a record of 43 arrests and no convictions" and the local newspaper article read by the juror publicized petitioner's case on trial and emphasized the period of time petitioner's case had been on the court docket.

2. Whether the petitioner was denied due process of law in the Supreme Court of the State of Illinois when by its judgment the court so construed the evidence that the burden of proof was unfairly placed on the petitioner to show that he had not committed the crime charged against him in the indictment upon which he was prosecuted and convicted.

STATEMENT.

Michael Malmenato was indicted by the grand jury of Lake County, Illinois on October 3, 1955 for the crime of attempted burglary of a building in the City of Highland Park. The indictment charged that on August 19, 1955, the petitioner with intent to feloniously steal, take and carry away the personal goods, money and property of Walter B. Strange and Lynn L. Strange did attempt to break into their building. After arraignment and plea, the defendant was tried by a court and jury, found guilty of attempted burglary as charged in the indictment and sentenced to serve a term of not less than three nor more than five years in the penitentiary.

At about 9:15 on August 19, 1955, three men were seen moving in the direction of a building in the City of Highland Park, Illinois (R. 11). The men were not identified; and the evidence against the defendant was circumstantial (R. 14). Witnesses for the prosecution consisted of seven police officers who were called to the building, two passersby and one of the owners of the property in question (R. 3-7, 9, 10, 13, 23, 24, 26, 29, 42, 46).* The Petitioner was not seen near the building in question; but he was found not far from the premises by a police officer who was making an investigation of the alleged burglary attempt (R. 3-14). Near the premises in question, one of the police officers found a flashlight on which was a left thumb print of the defendant (R. 3-15, 3-26).

Petitioner's trial began on the 8th day of April, 1957. At the end of the first day the trial judge admonished

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* The trial court record printed for use in the Supreme Court of Illinois is on page 3 of the Record transmitted to this court. References to this part of the Record are in this form: (R. 3-).

the jurors against reading any articles about the case in the newspapers (R. 3-32, 34). Upon the convening of court in the morning of April 9th, counsel for petitioner made a motion (R. 3-32) to have a juror withdrawn and a mistrial declared because of an article that appeared in the Waukegan News-Sun on the evening of April 8, 1957. The newspaper article was made part of the motion as "Exhibit A" (R. 3-32).

Counsel for petitioner proved that the newspaper in question had a circulation in the city of Waukegan of 35,000 copies per day, and that it was the only daily newspaper in the county. Petitioner also showed to the court that Lake County had a reading population of between 90 to 110,000 readers (R. 3-33). Petitioner requested of the court that the jurors be interrogated to determine if any of them had subscribed to the Waukegan News-Sun and whether any of the jurors had read the article. Upon inquiry, one juror, in the presence of the other jurors, admitted having read the article. The court admonished the juror for having violated the court's instructions (R. 3-34, 35). The court asked the juror "Do you think you can still be a fair and impartial juror in this case?" The juror replied, "It didn't have much effect on me." The court denied the motion (R. 3-35).

After judgment and sentence Petitioner obtained a review in the Supreme Court of Illinois (R. 11-20). The trial court judgment was affirmed (R. 20) in an opinion in which the Supreme Court said, "* * * The defendant did not have the burden of proving his innocence, but, having elected to explain his presence in the locality, and his fingerprint on the flashlight, it was incumbent upon him to tell a reasonable story or be judged by its improbabilities * * *" (R. 16). This petition is for a writ of certiorari to review the judgment of the Supreme Court of Illinois (R. 20).

REASONS FOR GRANTING THE WRIT.

1. The case here made by petitioner presents the proper occasion for this court to review the recurring constitutional questions arising out of prejudicial newspaper publicity on a defendant's rights to a fair trial in a state court criminal proceeding.

The incident which gave rise to the federal constitutional question here raised was called to the attention of the trial court when the court reconvened to hear petitioner's case (R. 3-32, 35). The article which had been read by the juror was made a part of the motion as an Exhibit (R. 3-77). This article which appeared in the Waukegan News-Sun on the day the jury was selected to hear petitioner's case, contained the following language:

> "Michael Malmenato, 25, of Chicago, went on trial in Circuit Court today.
>
> "The case had become noteworthy for the many continuances which had delayed it.
>
> "Malmenato is charged with the attempted burglary of August 19, 1955, of the Evans Garden and Pet Supply Company, 794 Central Avenue, Highland Park.
>
> "Since then the case has been continued on varied occasions. One of the most recent reasons for delay was the fact that Malmenato was injured early last November in a traffic accident.
>
> "A jury was picked this morning and Assistant State's Atty. Bruno W. Stanczak made his opening statement. Working with Stanczak is Assistant State's Atty. Kenneth R. Shorts. Defense Attorneys are Henry Fisher, Waukegan and Myer Gladstone, Chicago.
>
> "Presiding is Judge Bernard M. Decker.
>
> "Malmenato reportedly has a record of 43 arrests and no convictions."

Serious objections to the trial continuing under these circumstances were made by the counsel for the petitioner and the facts upon which these objections were based were not denied (R. 3-33). For example, it was not contradicted that the newspaper in question was the only newspaper of general circulation printed and published in Waukegan. This newspaper had an approximate circulation of 35,000 copies per day. The most damaging portion of the prejudicial article was stated by counsel for petitioner and its purport was not denied (R. 3-33).

This court in cases presented to it by petition for certiorari to review the exercise of discretion in a trial court on motion for mistrial based on prejudicial publications during the trial, has never disturbed the rule that procedurally grant of such motion for mistrial is within the trial court's sound discretion. *Marrin* v. *United States*, 3 Cir., 167 F. 951, 953, certiorari denied 223 U.S. 719. However, the Fourteenth Amendment to the Constitution of the United States is a protection against criminal trials in state courts which are conducted in a manner disregarding fundamental fairness which this court and every system of criminal jurisprudence has determined is essential to the very concepts of justice. *Lyons* v. *State of Oklahoma*, 322 U.S. 596. A trial in a state court which violates "* * * principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental * * *" will not be upheld by this court when it applies the restrictive limits of the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Palko* v. *Connecticut*, 302 U.S. 319. This court has said that in a state criminal trial "* * * denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order

to declare a denial of it * * * [The Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial * * *." *Lisenba* v. *California*, 314 U.S. 219.

In applying these essentials to the case at bar we submit that it is only necessary for this court to consider the practical trial influence on the prejudicial publication here shown of record. It is true that inquiry into the effects of this article was made by the trial court (R. 3-34, 35). We respectfully submit, however, that this cursory concern by the trial judge did not meet the requirements of the due process clause to the Fourteenth Amendment to the Constitution of the United States. Certainly, this court is not bound by the actions of the trial court if it appears from the record that the cautionary steps taken by the trial judge fell short of protecting petitioner from infringement of rights secured and guaranteed to him by the Constitution of the United States. *Williams* v. *Georgia*, 349 U.S. 375. To the extent that this court finds that the proceedings here involved depart from "* * * basic requirements of orderly justice and hence due process * * *". This court will correct the judgment of the courts of Illinois. *Wolf* v. *People of the State of Colorado*, 338 U.S. 25; *Rochin* v. *People of the State of California*, 342 U.S. 165.

The question here presented by petitioner is not new. That the constitutional and practical problems are not easy are indicated in the actions of this court. *Leriton* v. *United States*, certiorari denied, 343 U.S. 946; *Weber* v. *United States*, certiorari denied, 344 U.S. 843. The cases involving similar constitutional questions have varied factually. *U.S.* v. *Howell*, (CA 3d Pa.) 240 F 2nd 149; *U.S.* v. *Postma*, (CA 2d NY) 242 F 2d 488. Cases on this subject are col-

lated in Anno: "Juror reading newspaper", 31 ALR 2d 417.

This court in *Shepherd* v. *State of Florida*, 341 U.S. 50, evaluated the effects of prejudicial publicity during trial and the uselessness of a verdict after adverse publicity in local newspapers. That adverse publicity may be important in determining the fairness of a state court criminal trial is supported by this court's decision in *Stroble* v. *State of California*, 343 U.S. 181. From these authorities it is plain that the constitutional contention here made by petitioner is decisive. We respectfully submit that even only one juror reading an adverse newspaper article unfairly emphasizing petitioner's alleged criminal record while his case was being considered by the jury, deprived the petitioner of rights secured and guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

2. Due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the factfinder of his guilt.

In the state court prosecution petitioner was charged with the crime of attempted burglary (R. 11). The evidence was circumstantial (R. 14). But because petitioner failed to convince the court and jury concerning his defense, the Supreme Court of Illinois in its judgment held that petitioner had failed to carry the burden put upon him (R. 13-14). At one point in its judgment the Supreme Court of Illinois said (R. 13):

> "• • • He made no attempt to describe the person who he said came to his cell with the flashlight. He stated that he 'took it for granted' the person was a police officer, but did not know who he was. He did not testify that the flashlight which was handed to him

> was the exhibit from which the fingerprint was taken and, while he is right handed, he did not remember whether he took it in his right or left hand * * *"

Clearly, this construction of the proof by the Supreme Court of Illinois shifted an unfair burden of proof upon petitioner. It appears quite clearly that petitioner's testimony and the evidence it represents were being subjected to tests of credibility not applied to other evidence under similar circumstances. At another point the Supreme Court of Illinois said (R. 16):

> "* * * The defendant did not have the burden of proving his innocence, but, having elected to explain his presence in the locality and his fingerprint on the flashlight, it was incumbent upon him to tell a reasonable story or be judged by its improbabilities * * *"

The Supreme Court of Illinois is one of the instrumentalities of state government; and its actions when they impinge upon the constitutional rights of petitioner are actions of the state having the same effect as the adoption of a statute by the State of Illinois. *Shelley* v. *Kraemer*, 334 U.S. 1; *Marsh* v. *Alabama*, 326 U.S. 501; *Hysler* v. *Florida*, 315 U.S. 411. The requirements from the State of Illinois in conforming through its judicial power with the limits of the Fourteenth Amendment are the same as is required of its legislature. The limits of the Fourteenth Amendment are the same in either case. *Shelley* v. *Kraemer*, 334 U.S. 1; *In re Murchison*, 348 U.S. 133; *Lyons* v. *Oklahoma*, 322 U.S. 596.

Recently this court had occasion to apply in a much more complex situation the full impact of the constitutional concepts we here assert. In *Speiser* v. *Randall*, ... U.S. ...., 78 S. Ct. 1332, this court said: "* * * And the more important the rights at stake the more important must be the procedural safeguards surrounding

those rights * * *. Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression * * *" *Morrison* v. *People of the State of California*, 291 U.S. 82. In civil cases, a statute unfairly shifting the burden of proof runs afoul the requirements of due process. *Western & A. R. Co.* v. *Henderson*, 279 U.S. 639. In the case at bar the judgment of the Supreme Court of Illinois had the same effect.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE N. LEIGHTON,
MYER H. GLADSTONE,
Counsel for Petitioner.

APPENDIX A.

Docket No. 34539—Agenda 2—March, 1958

The People of the State of Illinois, Defendant in Error, v. Michael Malmenato, Plaintiff in Error.

Mr. Chief Justice Davis delivered the opinion of the court:

The defendant, Michael Malmenato, was convicted by a jury in the circuit court of Lake County of the crime of attempted burglary, and sentenced to serve a term of not less than three nor more than five years in the penitentiary. By writ of error he seeks to reverse the judgment of conviction. The errors assigned relate to the admission of evidence, its sufficiency to convict, the giving and refusal of instructions and the failure of the circuit court to withdraw a juror and declare a mistrial because of the publication of a certain newspaper article during the trial.

The evidence for the People established that on August 19, 1955, the Evans Garden and Pet Supply Store, herein called the store, was located on Central Avenue in Highland Park, Lake County, in a one-story brick building with a skylight, the glass portion of which was elevated above the roof surface. The residence of John Sweeney abutted an alley which led to the rear of the store. At about 9:30 P.M. on the date in question, he saw three men walk up the alley in the direction of the store. It was dark at the time, but the men passed within 25 feet and he saw that they wore light-colored shirts and that one of them was carrying something. In a short time, he heard noises emanating from the vicinity of the store which sounded like someone tearing

up boards or iron, saw rays of light on the roof which appeared to come from flashlights, and he called the police.

Paul J. Kaehler, the first officer to arrive, parked his patrol car in front of a house next door to the store and walked up the alley to the rear of the building. As he approached the southeast corner of the store he saw one man on the roof, one on the ground, and another climbing down the drainpipe from the roof to the ground. As the last man descended, Kaehler flashed his light and ordered them to stop, but all fled. Two men ran down the alley to the west and the third jumped a fence and ran to the north. The officer fired a warning shot but did not pursue them. He observed that all were wearing light-colored shirts. After the chief of police, officer Mario Marchi, and other officers arrived at the scene, they went to the roof of the store building, discovered that a strip of metal had been torn from the skylight, and found a crowbar 18 inches in length. About six feet east of the store, they found a ten-pound sledge hammer.

Officer Marchi then drove around the neighborhood in a patrol car looking for suspects. At about 10:20 P.M., while proceeding in a westerly direction about ¼ mile west of the store, he saw a man, about 25 feet from the roadway, who was crouched down in some bushes which were about four feet high. He stopped the car and ordered the man to come out with his hands up. As the man approached the car, he stated that he had been looking for an officer, and Marchi replied: "That makes it even. I am looking for you." Marchi testified that this man, later identified as the defendant, was wearing a light-colored sport shirt which was stained as though from green foliage; that there were scratches on his face and arms and one hand was bleeding; that he told the defendant that he was suspected

of an attempted burglary, searched his person, but found nothing; and that defendant stated to Marchi that he had been thrown out of a car just prior to his arrest, while trying to hitch-hike a ride to Milwaukee. The officer then took defendant to the police station where he was locked up. Defendant gave his name and address, but made no further statement.

About daybreak, on August 20, officer Marchi returned to the place of the attempted burglary. He found a pair of cotton gloves in the alley near the fence, and a nickel-plated flashlight in the backyard of the house next to the store, and about 100 feet west of it. Northwesterly about 150 feet from the store and in the front yard of the next residence, he found a brass flashlight, two pair of cotton gloves and a screwdriver. A loaded revolver was found 200 feet further west on Central Avenue. Except for the gloves, Marchi did not touch any of these articles, but lifted them with a wire, placed them in a box, took them to the police station and turned them over to the chief of police. Marchi testified that such items were kept in a special room accessible only to the chief of police and police captain Earl Lampinen.

Ray Lange, a police sergeant who came on duty at about midnight following defendant's arrest, took the defendant's fingerprints, which impressions were made on a card signed by the defendant and him. Captain Lampinen came on duty at 11:00 A.M. on August 20, went to the special room and observed the articles which Marchi had recovered, lifted them with a wire and laid them on a table where he dusted them for latent fingerprints. The revolver and nickel flashlight were negative, but the brass flashlight produced a latent print which was lifted by tape in the usual manner and later photographed. This was compared

with the fingerprints taken from the defendant. At the trial both Lampinen and a fingerprint expert from the Bureau of Identification of the Chicago Police Department testified that the latent print taken from the flashlight was identical with the print of the middle finger of defendant's left hand.

The defendant testified in his own behalf and denied that he participated in any way in the attempted burglary. He gave his address as 1658 W. Ohio Street, Chicago, and stated that he usually helped his father who operated a fruit and vegetable business, but had not worked on August 19 because of a headache. He further testified that he arose at about 1:00 P.M. on that date, had breakfast and then went by bus to a forest preserve located 10 or 12 miles northwest of his home; that he remained there until about 7:30 P.M. when he went to the northwest corner of the intersection of Milwaukee and Devon avenues to board a bus to go home; that he saw no bus, decided to thumb a ride, and was immediately picked up by a two-door car; that the person in the front seat on the right side got out and entered the rear seat; that he got into the car and sat in that part of the front seat; that the car had proceeded only half a block when he felt something cold on his neck and was ordered by the person in the rear seat to get down; that he complied and lay on the seat with his feet toward the side of the car and his head toward the driver; that the person in the rear seat went through his pockets and removed his wallet; that he did not know how long they drove or where they went but eventually he was shoved out of the car while it was in motion; that he was somewhat dazed from the fall and the next person he saw was officer Marchi; that he was not crouching in the bushes but was walking along the road when the officer drove up;

that as Marchi stopped, he walked over to the automobile, stuck his head in the door and said: "Maybe you are the one I am looking for, you could help me out"; that Marchi then said: "That's funny, I have been looking for you," and immediately began to question him about a robbery; and that he told the officer that he had been robbed and thrown out of a car, but Marchi refused to believe him, took him to the police station and locked him up.

Defendant further stated that three or four hours after he had been locked in a cell the police sergeant took him to another room and fingerprinted him, then put him back in the cell; that at "about daybreak" someone awakened him, handed him a flashlight and said: "Did you ever see this flashlight?" and that he replied that he had seen a lot of flashlights but not that one. On cross-examination he stated that he didn't know the person who handed him the flashlight; that "I grabbed it with my right or left hand; it could have been either one;" and that he held it only a few seconds.

While the evidence against the defendant was circumstantial in nature, it was sufficient to establish his guilt beyond a reasonable doubt and justify a verdict of guilty, unless explained by other evidence or facts and circumstances which would raise a reasonable doubt of his guilt. Defendant was found in the immediate vicinity of the attempted burglary within an hour of its commission under circumstances which were highly suspicious. The scratches on his arms and face and the stains on his light-colored sport shirt were consistent with the belief that he was one of the men who hastily fled from the scene of the crime. If officer Marchi's testimony was credible, defendant, at the time of his apprehension, was found crouching in the bushes adjacent to the roadside, far from his Chicago home

and in a neighborhood where he had no apparent business or pleasure purpose. It is uncontradicted that flashlights were used in the attempted burglary and that defendant's fingerprint was on the flashlight which was found in the path of the felons' flight, about 150 feet west of the store. This was evidence of the highest character and positively connected the defendant with the crime.

Counsel argued, however, that defendant told a reasonable story to explain the presence of his fingerprint on the flashlight; that his account was not denied by any of the officers; and that the evidence as a whole was insufficient to establish guilt because the presence of the fingerprint was consistent with defendant's innocence. This argument is based upon the false premise that the jury, in the absence of a denial by the officers, were bound to believe the defendant's testimony. When a defendant elects to testify in his own behalf, his credibility is to be tested by the usual rules applicable to other witnesses. In determining the credibility of a witness, including a defendant, the jury may take into consideration, among other things, the probability or improbability of the truth of his statements in the light of human experience. (*People* v. *Surace*, 295 Ill. 604; *Chambers* v. *People*, 105 Ill. 409.) The jury are not entitled to disregard the accused's testimony merely because he is the defendant in the case, but it may consider his interest in the result of the trial in weighing his testimony. (*People* v. *Meyer*, 331 Ill. 608; *People* v. *Surace*, 295 Ill. 604.) If the testimony of the defendant is so unreasonable as to be judged improbable, or, in the absence of contradictory evidence, so remarkable as to almost seem incredible, the jury may reject it. *People* v. *Jordan*, 4 Ill. 2d 155; *People* v. *Meyers*, 412 Ill. 136; *People* v. *Uher*, 375 Ill. 499.

(Opinion)

The jury could have found the defendant's story concerning the flashlight incident so inherently improbable as to render it unworthy of belief. In order to give it credence the jury had to believe that someone connected with the police department was either extremely careless or sought to perpetrate a fraud. Anyone with police experience would know that fingerprints on the surface of the flashlight would be smudged or obliterated by touching. This possibility would be greatly increased if both an officer and the defendant took hold of the flashlight as defendant testified. In view of the uncontradicted testimony of the officers relative to the care used in picking up the flashlight, we cannot believe that any of them would handle it in the manner described by defendant. The only alternative is to believe that an officer deliberately sought to trap the defendant into holding the flashlight in order to secure evidence for his conviction. There is nothing in this record which would warrant that conclusion, or indicate that any officer involved in this case was actuated by improper motives. In the absence of such evidence, neither the jury nor this court would be justified in believing that the members of the police department resorted to trickery to obtain a conviction.

Defendant's testimony is not only inherently improbable, but is also vague and unsatisfactory. He made no attempt to describe the person who he said came to his cell with the flashlight. He stated that he "took it for granted" the person was a police officer, but did not know who he was. He did not testify that the flashlight which was handed to him was the exhibit from which the fingerprint was taken and, while he is right handed, he did not remember whether he took it in his right or left hand. The jury were entitled to consider all of this testimony, as well as the defendant's narration of his abduction and robbery which attempted

to account for his presence in the neighborhood. It can fairly be said that his testimony concerning his abduction was not only unconvincing and unsatisfactory, but, like his testimony concerning the flashlight, was also vague and fraught with improbability.

The defendant did not have the burden of proving his innocence, but, having elected to explain his presence in the locality and his fingerprint on the flashlight, it was incumbent upon him to tell a reasonable story or be judged by its improbabilities. (*People* v. *Meyers*, 412 Ill. 136.) Where the evidence is conflicting, the credibility of the witnesses and the weight to be given their testimony is a question for the jury, and this court will not substitute its judgment for that of the jury or the trial court. *People* v. *Hinderhan*, 405 Ill. 435; *People* v. *Smith*, 391 Ill. 172.

Defendant complains of an instruction given to the jury at the request of the People in which reasonable doubt was defined in both positive and negative terms, and which stated, *inter alia*, that "reasonable doubt does not mean the possibility that the accused may be innocent." It was obviously framed from a similar instruction approved by this court in *People* v. *Lucas*, 244 Ill. 603, and may be distinguished from the instructions involved in *People* v. *Rosenberg*, 267 Ill. 202, and *People* v. *Fox*, 269 Ill. 300, relied upon by defendant, in which this court held the instruction erroneous. Reasonable doubt is a term which needs no elaboration and we have so frequently discussed the futility of attempting to define it that we might expect the practice to be discontinued. (*People* v. *Schuele*, 326 Ill. 366; *People* v. *Rogers*, 324 Ill. 224.) Nevertheless, both the People and the defendant tendered instructions attempting to define or qualify the term. However, upon careful consideration of the questioned instruction, we find it free from prejudicial error. Cf. *People* v. *Maffioli*, 406 Ill. 315.

(Opinion)

Defendant urges that the court erred in refusing to give his instruction No. 26, which stated that if there were two reasonable theories which might arise from the evidence, one pointing to his guilt and the other to his innocence, the jury should adopt the theory consistent with innocence and acquit him. The trial court held that this instruction was not applicable under the facts and we agree. Such an instruction is proper only when opposing theories of guilt or innocence arise out of the same facts. (*People* v. *Maffioli*, 406 Ill. 315.) In this case the theories of the defense and prosecution arise out of unrelated facts. In its essence, defendant's theory is in the nature of an alibi, as in *Maffioli*. Defendant would have the jury believe that at the time the crime was committed, he was being driven about in an automobile by his abductors and therefore was not a participant. Under these circumstances, the instruction was properly refused.

Defendant urges that the burglary tools, including the hammer, crowbar, flashlights and revolver should not have been admitted in evidence because there was nothing to connect them with him. This ignores the presence of defendant's fingerprint on one of the exhibits. All of these items were found in the immediate vicinity of the attempted burglary, and in the general area in which the defendant was arrested. They were competent to prove the *corpus delicti* of the crime of attempted burglary and their connection with the accused was sufficiently established. The presence of the gloves indicates that some care had been taken to avoid leaving fingerprints which explains their absence from many of the items.

Defendant also complains that witnesses for the prosecution were allowed to make many incompetent and prejudicial statements against him. However, the record reveals

that such remarks or statements were few in number, not of a prejudicial character, and that the court sustained objections to such remarks and ordered them stricken. The record fails to reveal any calculated attempt to deprive the defendant of a fair trial and establishes that the trial court at all times zealously guarded the rights of the accused even to the extent of denying the admission of a certain purported conversation between defendant and Captain Lampinen which in our opinion was competent.

Defendant also contends that his right to a fair trial was seriously prejudiced by a brief article in the Waukegan News-Sun on the morning of the second day of the proceeding which, after stating that the case had gone to trial and naming the counsel involved, concluded: "Malmenato reportedly has a record of 43 arrests and no convictions."

At the close of the first day, the judge admonished the jurors not to discuss the case among themselves or with anyone and specifically asked them to refrain from reading any newspaper article which might appear concerning it. On the following morning, defense counsel made an oral motion to withdraw a juror and declare a mistrial, based on the publication of this news item. The court interrogated the jurors and found that only one of them had read it; stated regret that the instructions of the court had been violated; admonished the juror that nothing he had read was evidence against the defendant; stated that the item should not be discussed with other jurors and should not influence him in his deliberations; and asked the juror whether he thought he could still be a fair and impartial juror in the case. The juror replied in the affirmative stating: "It didn't have that much effect on me." The motion was thereupon denied.

(Opinion)

Such motion is addressed to the sound discretion of the trial court. (*People* v. *Mangano*, 354 Ill. 329.) The exercise of that discretion is always subject to review and its abuse will constitute reversible error. (*People* v. *Hryciuk*, 5 Ill. 2d 176; *People* v. *Murawski*, 394 Ill. 236.) The question presented is whether the jurors, or any of them, have been influenced and prejudiced to such an extent that they would not or could not be fair and impartial, and each case must be determined on its own peculiar facts and circumstances. (*People* v. *Gambino*, 12 Ill. 2d 29; *People* v. *Rogers*, 303 Ill. 578.) The statement of a juror that he has read but was not influenced by the article is not conclusive, and due consideration must be given to the nature and character of the statements themselves. (*People* v. *Hryciuk*, 5 Ill. 2d 176.) Noteworthy among the cases in which this court has found prejudice to exist are *People* v. *Kenzik*, 9 Ill. 2d 204; *People* v. *Hryciuk*, 5 Ill. 2d 176, and *People* v. *Murawski*, 394 Ill. 236; all cited by defendant. In *Murawski*, an abortion case, the article stated that defendant had been twice indicted for abortion and once for murder by abortion but had never been brought to trial. In *Hryciuk*, where the charge was forcible rape, the article stated that defendant had confessed to two murders for which the State planned to try him and ask the death penalty; that he had boasted of attacks on more than fifty women and was described by the police as a vicious degenerate. In *Kenzik*, a murder case, the news item stated that defendant, who had fled following the slaying of his wife, had a long criminal record and had been named by the Federal Bureau of Investigation as one of its ten most wanted men. In all of these cases the information in the article was attributed to the State's Attorney's office and there were facts which led this court to believe that a number of the jurors had read the items and had been in-

fluenced thereby. In *Kenzik*, it appeared from the evidence introduced in support of a motion for new trial that at least three of the jurors had read the account and discussed it among themselves, and the foreman stated that he and the others could not keep the article out of mind while they deliberated.

There is nothing in the present case to indicate that the jurors may have discussed the questioned article among themselves. The article was inadvertently read by one of the jurors who stated that its contents would not prevent him from being fair and impartial. He was solemnly admonished by the court not to mention it to the other jurors and all jurors were then reminded that nothing appearing in a newspaper could be considered as evidence in the case. At the conclusion of the case, the jurors also received a written instruction to this effect. Under the circumstances we cannot say that the court abused its discretion in denying the motion to withdraw a juror. An accused is entitled to a fair trial and his rights must be zealously guarded by court and counsel, but a reversal is not indicated merely because a newspaper prints some statement derogatory of the defendant during the trial. To warrant a reversal, it must reasonably appear that the jurors, or at least some of them, have been influenced or prejudiced to the extent that they cannot be fair and impartial. Such evidence is lacking in this case.

The judgment of the circuit court of Lake County is affirmed.

Judgment affirmed.